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ABSTRACT

This paper examines the current context and historical background of Federal Day Care Standards. Section I briefly defines the term standards, describes different types of standards, and discusses the rationale for minimum day care standards. Also examined in this section are: the process of standard formulation; legal defense of a standard as reasonable; dangers in standards as seen by the legal profession; and standards as a vehicle for social change. Section II traces the history of day care standards in the United States. Topics discussed include: (1) early history, (2) standards and national organizations, (3) recent history of standards and the government, (4) legislative history of the Federal Interagency Day Care Requirements, (5) Congressional intent, (6) administrative history of FIDCR, (7) evolution of standards for day care, (8) some basic issues, and (9) regulation in context. (JMB)

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FEDERAL DAY CARE STANDARDS IN CONTEXT

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Gwen G. Morgan
Wheelock College

August 15, 1977

Note: This paper is a shortened version of a longer paper on the same subject prepared on March 15, 1976. For those with an interest in pursuing the topic in depth, the longer version is available.

Parts of the paper, as noted, were written by Barry Mintzer, and other parts lean heavily on unpublished work presented orally by Norris Class.

I am indebted to many friends who have shared their ideas with me, and to many others who reviewed early drafts. The list is too long to include here. Special acknowledgement must be given to Edna Hughes, who led me to understand the importance of the subject of regulation, and who helped me to develop the necessary concepts to understand it.

FEDERAL DAY CARE STANDARDS AND THE LAW

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FEDERAL DAY CARE STANDARDS
IN CONTEXT

During the last eight years, debate over the standards which should be applied to day care, and over the role of the federal government, has grown steadily more emotional. It is time to take an objective look at the subject, defining terms and concepts with more care. If proponents of day care will define their goals more clearly, and use words in the same way, the Congress will be better able to develop coherent policy for children.

SECTION I: STANDARDS

Definition

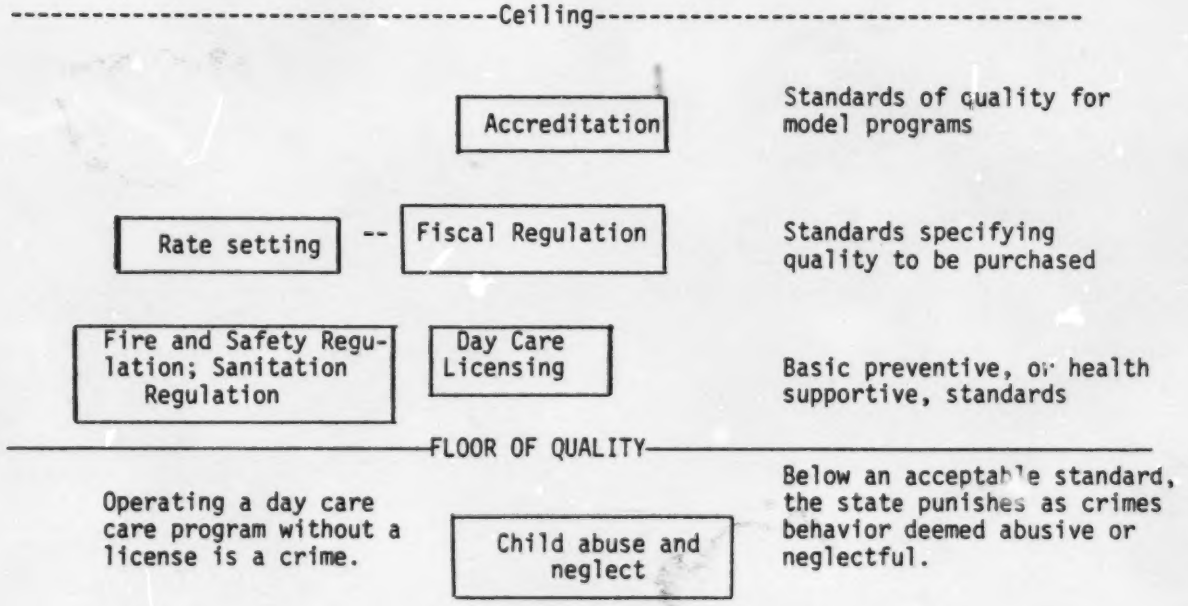
A major initial problem is the fact that the word "standard" is used in very different ways, and there have been major changes historically in the use of the word. The one English word has descended from two different Latin roots: one of them "estendere" meaning "to wave as a flag," and the other "Standere" meaning "to fix or to stand."[1] Administrative law often uses the word "standard" in this second sense to mean measurable norms in respect to safety, health, and child care. From this second root, also, comes the common usage of the verb "to standardize," meaning to bring an entire class of things into conformity.

Already in definitions, major issues for day care can be identified. We child advocates like to think of standards as ideals, banners of inspiration to improve the quality of life for children. When standards are goals, they cannot be imposed. People cannot be fined, put in jail, or de-funded for failing to achieve ideals. Standards as measures can be imposed and enforced, but their

level of quality would therefore be necessarily lower, in order to be achievable, than goals standards. One result of imposing such measures is standardization, and there is disagreement about the extent to which day care services in the country should be standardized, and the areas which should be protected for some degree of program autonomy.

Different Types of Standards

The word "standard" encompasses so many meanings that it needs a qualifying adjective to be useful, such as "licensing standards," "funding standards," "professional standards," "goals standards," or the like. The work done in the field of day care licensing has begun to develop a common terminology and a common conceptual framework in order to talk about regulation and other ways of achieving quality.[2]


Ceiling
Accreditation
Standards of quality for model programs
Rate setting
--
Fiscal Regulation
Standards specifying quality to be purchased
Fire and Safety Regulation; Sanitation Regulation
Day Care Licensing
Basic preventive, or health supportive, standards
FLOOR OF QUALITY
Operating a day care care program without a license is a crime.
Child abuse and neglect
Below an acceptable standard, the state punishes as crimes behavior deemed abusive or neglectful.

A "floor of quality" is represented by the line drawn by the states in establishing their licensing requirements. Also at the baseline are the regulatory codes of other bureaucracies regulating the environment: state statutes protecting people from fire and unsafe buildings, and other state statutes protecting people from the spread of disease and other health hazards. These baseline standards are often referred to as "minimum."

High quality standards, for model programs, represent a "ceiling" of quality to which we may aspire, a ceiling which may be raised over time as knowledge changes. Between the floor and the ceiling, fiscal standards may be imposed.

The present confusion over FIDCR and state licensing rests partly on a failure to conceptualize clearly the different kinds of standards and different levels of quality. State day care licensing applies to all programs, using the police powers of the states to permit only those programs which meet basic standards to operate within the law. Funding standards apply only to subsidized programs, and specify the level of quality which the funding agency has determined is necessary in order to achieve the goals for which the funds are being spent. Rate-setting, the other side of the coin of fiscal standard setting, determines the rate of payment necessary in order to assure adequate reimbursement so that programs can pay the costs of meeting the standards imposed upon them and also to be sure that funds are serving as effective incentives to program quality. A program with a license merely has state permission to operate, and should in no way be presumed to offer high quality. In places where there is a method of accrediting model programs in place, the confusion is less, and the regulated are clearer on the distinction between permission to operate and a banner of quality. Few communities have any system for accrediting high quality programs, however.

Another way of approaching quality might be to credential staff, or to credential administrators, and then to leave program standards to their professional wisdom. Other ways are not regulatory at all. These include consultation, education of the public, staff development, and evaluation.

Rationale for the Minimum

The word "minimum" whether for funding standards or for licensing, causes disagreement. "Minimum," however, does not necessarily mean "low." If an acceptable standard of national defense is the atomic energy necessary to destroy the world several times, it can be seen that the minimum can be set at a high level, if achievable. "Minimum" is a word used in connection with a standard which will be enforced or implemented, and means "least tolerable." Below the standard, sanctions are used: in the case of licensing penalties are imposed or the license removed; in the case of funding standards the subsidy is withheld.

For licensing purposes, there are two different general philosophies at present on the rationale for establishing a minimum:

a) The minimum level to assure life safety and health to a child;

b) The minimum level to contribute positively to a child's growth.

Those states using the first rationale tend to limit themselves to environmental standards. The assumption of the second rationale is that there are basic fundamental needs in the psychological sphere, and failure to meet them could do irreparable harm. If a mother checks her child into a day care program in the morning and picks her or him up at the end of the day unchanged, the child has suffered a deprivation, and has lost a "day's worth of growth."[3]

States guided by either the first or the second philosophy have been trying to write their licensing requirements in measurable language, and to make them enforceable. Those with the second philosophy are having difficulty in getting the important intangibles into concrete enough language so that they can be measured. For this reason, licensing codes tend to emphasize the environmental aspects more likely to hold up in court.

The second rationale would appear more appropriate than the first for FIDCR.

"Minimum" for licensing purposes need not be set at the same level as "minimum" for funding purposes. Licensing applies to all programs, regardless of whether they have any public funds. There is no inconsistency in having a higher standard in FIDCR, which in theory provide funds for meeting the standards.

The Process of Standard Formulation

For standards which are goals, or which are to represent the best thinking as to desirable practice in a particular field, the process is to assemble the leading specialists to work out agreement on their best recommendations. For standards which are to be enforced through licensing, or implemented through funding specifications and sanctions, the process becomes more complex, and a greater diversity of people must be involved.

Two major principles apply: (1) procedural due process; and (2) interest representation. Due process, relating to ever-widening interpretations of the Fifth and Fourteenth Amendments to the United States Constitution, and to Administrative Procedures Acts at the federal and state levels, refers to the concept that government must deal fairly and in a non-arbitrary way with citizens

affected by its action. The techniques center around giving notice, allowing an opportunity to be heard, giving access to information, right to appeal, and generally checking undue discretion of the regulatory agency. Because of the developments during and since the forties, there has been growing citizen access to the standard formulation process.

The concept of interest representation is related to procedural due process. The administrative agency in formulating the standards needs to include in its deliberations those with an interest in the outcome.[4] If all affected groups are represented in the discussion, it is more likely that there will be support for the resulting standards. An excluded group is much freer to try to overturn the standards during the public hearing process.

It is generally agreed that five major groups should be represented, with several kinds of representatives in each category.[5] The groups are: professionals or academic experts, from national organizations, federal agencies, the academic field; licensees, including proprietary and philanthropic auspices, parent cooperatives; child care staff; consumers; staff of the state administering agency; front line licensing staff; and the official representatives of other regulatory agencies such as health, building safety, fire safety, attorney general's office. The ways in which these different groups are involved may vary, but the process, if it is to arrive at an agreed on and supported set of regulations, needs to involve them all long before the public hearing stage. It is generally agreed that the process takes at least a year.

The importance of orientation of the participants to the process is a topic of new importance which has not received much attention in print. A group representing diverse interests, democratic as it is, will not automatically reach

consensus. Such a task requires skills in group process and an understanding of consensus as a decision making process different from collective bargaining and majority rule. At the very least, orientation will need to include: the value of standards to children, their families, and to providers of service; what standards are; how licensing standards, funding standards and goals standards differ; past experience in enforcing existing standards; comparative data on particular standards; how the standards are to be implemented; importance of consensus to later enforcement or implementation; and the overall timetable and process through which the group will seek its consensus and participate in hearings and revised drafts up until promulgation.

Legal Defense of a Standard as Reasonable

Every standard which is to be enforced or implemented, whether a licensing standard or a funding standard, needs to be defensible in rational terms; the agency imposing it needs to be able to defend it with reason. In the case of FIDCR, the Congress itself has asked for the rational basis of the standards in its mandate for a report on their appropriateness.

Standards can be defended on four different bases: (1) expert opinion; (2) hard, scientific data; (3) common practice, or (4) a consensus among interests represented.

Expertise is no longer the solid base it once was.[6] Courts tend to distrust experts when there is not a body of scientific knowledge on which they all agree. In a field such as child care, where experts can be found on two sides of almost any issue, the policy-makers cannot rely heavily on experts.

Studies are being made to produce data on the effects of child-staff ratio, staff professionalism, and parent role. However, there are also limitations on the extent to which science can adequately back up a standard. The number of

variables in any human system is so great that it is seldom that findings are so conclusive that they can be used to change policy.

Further, scientific data themselves do not produce a standard. The standard is a value statement, a policy which society has agreed to pursue. The data provide the best evidence possible of what the likelihood is that the standard will result in the desired effect. Societal goals will change over time, becoming more ambitious or less ambitious depending on other conditions. Always they will be based on value paradiam, not on scientific data.[7]

Common recognized practice in the different states, or in other countries, might be convincing to the courts or to other policy-makers. For a licensing standard, it is a very supportive and convincing argument to point to the fact that many other states make the same requirement. To use this kind of argument, FIDCR would need to point to a solid consensus in current practice. For most of the standards, there is not a common practice among the states and in other countries.

Finally, in the absence of acceptable expertise, hard data, or common practice, a standard could be defended as the final agreement from a process which has involved many different interests. As the states perfect their processes of standard formulation, they are also building the strongest possible legal defense against challenge to the standards. FIDCR, too, may now need such a process. Standards should be thoroughly re-examined every four or five years, which makes FIDCR overdue for an overhaul. The process of consensus building would be even more difficult at the federal level than it is in the states, but it is no less important. Only a fairly solid national consensus can bring about a set of standards which can be implemented, rather than mythology.

Dangers in Standards as Seen by the Legal Profession

Future trends may be affected by the concerns in the legal profession[8] about the arbitrary use of undue discretion by regulators, and the effects of standards. Among the dangers which are seen are the following:

- o Too often, the minimum standards for compliance become the goals of the regulated. Existence of a federal FIDCR would tend to inhibit setting standards of higher quality by states and local communities.
- o Standards tend to commit society to one theoretical model, stifling promising alternatives. Experts committed to one theory are quick to give advice which later proves incorrect.[9]
- o In the process of making regulations fair for all, regulators have failed to preserve important cultural differences of value to society. Furthermore, the result is a trend toward bland uniformity.
- o As standards for staffing go in the direction of more professional day care programs, the day care could undermine parents' roles in the education and care of their children.[10]
- o Time and money spent in measuring and monitoring bring excessive red tape and prevent entry into the field by new groups with innovative ideas.

Standards also have the effect of setting rates, since costs vary with standards. If standards for licensing or for subsidized children have the effect of pricing a needed service so that it becomes out of the reach of those who need it, the result could be greater harm than good.

In fields outside of human services, where issues of quality are not involved, there has arisen a strong disenchantment with regulation.[11]

Standards as a Vehicle for Social Change

Earlier in American history, standards were seen primarily as a way of bringing about social change. We are now in a period of emerging new understandings of the importance of the early childhood years. Professionals on the forefront of knowledge are impatient to see ideas implemented and shocked that harmful conditions continue in the face of new knowledge.

Psycho-historians place the beginning of a new era in child-rearing within very recent history.[12] Yet vestiges of all earlier modes survive side by side with the new. Laws and common law rulings are based on earlier modes. Children as yet have no established right to positive parenting in the new mode.

A California report proposes a division in state government to support parenting and makes a beginning on defining the rights of children to have such parenting.[13] The Massachusetts Children's Lobby filed a bill which attempted to establish the rights of children on the rationale of parental support, to head off the danger that professionals might see their role as intervention into the healthy family on a parens patriae model.

These are enormously important emerging ideas. An entitlement to positive parenting does not at present exist, although the need is evident, nor does the society entitle parents to help in these responsibilities. Statutory change will probably have to occur before this need becomes a right of children and their families.

Can standards be used to create the moral recognition that a need should become a right? It was in this way that many social advances were made in earlier

periods of history. Standards can probably still play this role in society. We need to educate the public to recognize the needs of children.

However, standards which are to be enforced and implemented, with penalties, cannot be the vehicles for social change. Licensing standards and even funding standards must approximate the state of the art to the extent that there are programs able and willing to meet them. Society has a need for goal standards and professional standards, but these goal standards cannot be imposed in law if there are substantial gaps between them and the state of the art in the field.

SECTION II: HISTORY OF DAY CARE STANDARDS IN THE UNITED STATES

Early History

The United States has used the idiom "child care standards" but without reference to enforcement, for over 100 years. Historical factors[14] have led to great confusion in state licensing offices and at the federal level over what standards are and how they are to be enforced.

In the years following 1863, the states followed Massachusetts' lead in creating state Boards of Charity and Boards of Control, lay groups of prominent citizens with rights to visit and give advice to superintendents of children's services. In the 1800's the citizens began coming together at the national level in a National Conference of Charities and Corrections each year. Much of the time of their meetings were spent in discussion of standards.

At the time, the field of child welfare was concerned with social change. Standards were used to contrast the conditions of life for children with what they should be. And change was certainly needed. Foundlings in institutions were not surviving.[15]

The first child care licensing law was passed in 1885 in Pennsylvania, regulating care of children by private individuals. Other states followed suit, but the early laws were weak and poorly enforced, and not a drastic change from the earlier Boards of Charity. More public support would be needed before real enforcement would become a possibility.

During this period citizens from the Boards of Charities visited and inspected programs for children. Standards at this time were ideals derived from introspective thought. The word "monitoring" was used but without any implication of control.

The emphasis on investigation of human conditions grew larger until the muckraking period, when journalists and novelists aroused widespread interest among the general public in changing these conditions, resulting in a great increase in regulatory administration as a characteristically American type of social reform.

As time went on, the influence of Darwin's scientific method of observation would come to predominate, and would later lead to today's emphasis on measurable standards. But from the beginning, the earlier idealism would continue side by side with the new scientific approach.

In 1912, after eleven bills, the United States Children's Bureau was created, with functions, in keeping with the time, to "investigate and report upon all matters pertaining to the welfare of children and child life among all classes of our people;" its object was "the betterment of the conditions of children." The emphasis is on fact gathering, and observations of public sentiment for action and change under federal leadership. And the federal government, too, is to provide leadership in the "best methods" of dealing with children, so that the contrast between actual conditions and guidance material will lead to informed action.

In the period following the creation of the Children's Bureau, a new phase began. More and more states began to pass licensing laws, responding to the general climate of regulatory reform. Day care and foster care were usually combined in these early laws. They used the term "licensing standard," adapting a word familiar since the Boards of Charities, rather than the term "requirement." Licensing was not introduced as a sharp break with their fifty years of discussion of ideals. Between 1910 and the 1960s most states passed and improved on their licensing laws. But until the late 1960's, there was no systematic attempt to enforce the standards, which were regulatory rhetoric.[15] There were a number of reasons for this.

(1) Most services were under philanthropic auspices, benevolent in nature. Regulatory agencies did not take an adversary stance to licensees, not wanting to add to the costs of charitable endeavors.

(2) Many services were under religious auspices. An argument of separation of church and state was widely used to resist licensure, even though it was a weak argument.

(3) There was public subsidy to private child care operations. Licensing agencies did not have to enforce their standards, because the subsidizing agency, usually the same agency, could threaten to withdraw the money.

(4) Between 1925 and 1930, professional social workers controlled licensing in the state agencies. Social work at that time was characterized by a "passive approach," -- one did not offer help unless asked for help. Their training led them to be hostile to the use of legal authority.

(5) The passive approach gave way to the depression years. With cutbacks in public subsidy and evaporation of Community Chest funds, it was hard to enforce standards. Then, with the coming of World War II, day care regulation played second fiddle to patriotism and getting women to work in the national defense. There was little or no regulation, even in states which had licensing laws. Strong licensing would have inhibited the massive expansion of day care in the national interest.

Until long after World War II standards were not enforced, but were considered educational or inspirational.

Child advocates pushed for regulation as the government began to expand day care and nursery schools during the depression and war days. Emphasis was not put on the immediate enforcement of the standards, since this would be a drastic change. In New York City, the Division of Day Care and Foster Homes "put far-sighted, high, mandatory standards into effect for over 20,000 children under six years of age."[16] Licensing was seen as a form of help to operators so that some day the goal of meeting the standards would be achieved. From a legal point of view this is a strange interpretation of "mandatory," although understandable in the light of historical evolution.

Standards and National Organizations

National organizations concerned over issues in day care of children are too numerous to describe fully. Several national organizations have been important in the development and support of standards.

The Child Welfare League of America, established in 1920, began around 1930 to set standards for a range of child welfare services, among them day care.

In 1969, the League published day care standards, the result of several years' work. The League is clear in describing its standards as goal standards. "They represent practices considered to be most desirable..."[17] League member agencies see their day care programs, if they have them, as models of quality in their communities. But it was not expected that they would be able to meet these standards, so that they would not be used as criteria for accreditation for League membership.

The use to which such goal standards may be put are described: "Standards can stimulate improvement of services only as they bring about dissatisfaction with present practices and conviction that change is desirable." This view of standards is similar to the traditional view of standards from the turn of the century. The League goes on to mention that standards are also of use "in establishing state and local licensing requirements," and also "they can help to explain and justify expenditures, budget requests to federated fund-raising bodies, and appropriation requests to legislatures." There may have been some confusion in the sixties over whether goal standards, representing best judgment about ideal practice rather than current practice even among League members, are appropriate for the purposes of licensing or funding standards. From the retrospect of the 1970's, it seems unlikely that decision-makers would allow child advocates to use goal standards to persuade them to enforce a level of quality not practiced in reality. There is potential for confusion on this point in the document.

Two other national organizations, the National Association for the Education of Young Children and the Association for Childhood Education International are the professional associations of early childhood educators. Of the two, NAEYC has shown a greater interest in day care, although the major priority of that large membership is on part day educational programs for young children.

The present Day Care and Child Development Council of America was a newly-reorganized advocacy group recent on the Washington scene when FIDCR was adopted. The goals and philosophy of the members stemmed from the Lanham Act days when the country supported day care out of concern and support for working mothers. Other sister national organizations, notably the Child Welfare League and the National Association for the Education of Young Children recognized the lack of a strong national organization with a single focus on the unmet national need for day care among working families. With their support and encouragement,[18] the National Committee for the Day Care of Children enlarged its board, changed its name to the Day Care and Child Development Council of America, Inc., and moved its base to Washington in the later part of the sixties.

During the period immediately preceding 1968, then, there were several important national organizations in support of day care quality. On the surface, at least, there appeared to be a consensus in favor of "quality day care." The word "quality" however is an ambiguous and undefined term which can cover a range of positions.

As long as standards were not enforced, it was possible for the national organizations to use words like "standards," "quality," "appropriate," and the like very ambiguously, and to evade some unresolved issues and unexamined assumptions. The sixties and early seventies have been characterized by a steady movement toward effective enforcement in licensing and toward implementing the FIDCR. Finally, with the writing of standards into the law in Title XX of the Social Security Amendments, it suddenly becomes necessary to become very clear on issues which previously could be glossed over. At present, however, owing to historical factors and lack of clarity about what standards are, the picture among advocates is almost hopelessly muddled.

Recent History of Standards and the Government

Day care standards entered a new phase in 1962, when the Social Security Amendments made federal money available for day care only if licensed by the states. Following this Congressional mandate, most of the states which had not licensed earlier now did so. Federal funds were not easily available for state licensing, and technical assistance was not offered. Licensing workers followed the model of earlier state licensing and tried to tailor their professional training, usually in social work or early childhood education, to their new quasi-legal responsibilities. The result was often poor and sometimes arbitrary enforcement, an emphasis on consultation not connected with requirements, and a lack of understanding of the rights of licensees.

With weak laws in some cases, with no training in how to revoke a license, and little administrative support for negative action, the licensing workers felt helpless to move against existing centers, usually grandfathered in at the time of passage of the law. The result was that poor centers were often permitted to continue, but the licensing process, in some cases, proved to be a barrier to new programs getting started.

In most states, the licensing responsibility was lodged in the same agency responsible for child placement, and for purchase of service -- the state's welfare agency. Staff in these agencies merged licensing with other functions, blurring important distinctions. Today at the local level, many child welfare workers still wear at least three hats: they find homes, they place children, they license. Home-finding uses administrative standards set by the agency. Licensing uses legally-based standards, or requirements. Child placement is done with standards derived from the professionalism of the

placement worker. When one worker does all three things the result is a conceptual confusion. When FIDCR was added to the picture in 1968 without clear standards for administration and without training, the confusion is compounded.

Toward the end of the sixties, a changed public climate of opinion created two serious problems for licensing offices. Advocate groups widely disseminated the figures on the gap between the numbers of working mothers and the numbers of spaces in licensed child care programs. There was a new concern for the well-being of children who need child care and do not have it. While in the early sixties licensing staffs had been seen as protectors of children in day care, now a new ambivalence arose out of concern for children not in day care. For new groups trying to meet children's needs with new day care, standards meant costs, they meant finding buildings which were increasingly scarce in the inner city. And if the group was in any way different from the dominant culture, there was a suspicion that licensing was being used unfairly.

Second, and even more serious, the licensing process itself had become very cumbersome and intolerably time-consuming, especially in the large cities. According to the Abt studies of exemplary day care programs and the survey of state licensing done by Conserco, it took an average of one man year to get a program licensed. This problem was incorrectly diagnosed as the fault of unreasonable standards. In reality the problem is a statutory one at the state level, arising out of a dysfunctional lack of fit between the statutory mandates of four major regulatory systems of which day care licensing is only one. Not understanding this, many people concerned to get more day care underway, including federal officials, began to be hostile to state licensing, and to talk of bypassing the cumbersome processes.

Head Start was born in an era of impatience with existing institutions and a desire to create new ones to bypass the established structures, particularly state and city governments. Head Start had its own federal fiscal standards, in the form of program guidelines, and many believed it was not subject to state licensing. Federal confusion at this point added to the public confusion over the difference between state licensing and the federal standards.

As a result of all these factors, as well as the tendency of child advocates to push for high standards while exhibiting hostility to law enforcement, public support for licensing has eroded to become ambivalent.

Legislative History of the Federal Interagency Day Care Requirements [1]

On December 23, 1967, Public Law 90-222[2] was enacted as an amendment to the Economic Opportunity Act of 1964.[3] Among other things, it directed the Director of the Office of Economic Opportunity (the Director) and the Secretary of Health, Education and Welfare (the Secretary) to

> ...take all necessary steps to coordinate programs under their jurisdictions which provide day care, with a view to establishing, insofar as possible, a common set of program standards and regulations, and mechanisms for coordination at the State and local levels.[4]

The programs to be coordinated included "Project Headstart"[5] and "day care programs necessary to enable parents...to become or remain self-sufficient..."[6] as well as all other day care under the jurisdiction of the Secretary, which would include day care in the Social Security Act. Joined by the Department of Labor, which also funded day care in several of the labor programs, the Director and the Secretary published their final regulations in the Federal Register on January 29, 1968.

In 1972, the Congress amended the authorization for FIDCR by language in in Title 4-A of the Social Security Amendments, mandating the existing requirements as a base below which future requirements could not go:

> Such standards shall be no less comprehensive than the Federal Interagency Day Care Requirements as approved by the Department of Health, Education and Welfare, the Office of Economic Opportunity, and the Department of Labor on September 23, 1968.[7]

In 1975, the Congress rewrote the entire FIDCR statute by mandating in Title XX of the Social Security Amendments the existing regulations, not just as a floor, but as the specific day care requirements to be met by federally funded programs:

> (9)(A) No payment may be made under this section with respect to any expenditure in connection with the provision of any child day care service unless (ii) in the case of care provided outside the child's home, the care meets the Federal interagency day care requirements as approved by the Department of Health, Education and Welfare and the Office of Economic Opportunity on September 23, 1968;[8]

Congress apparently concluded that the Department of Labor either had not been one of the approving agencies on September 23, 1968, or its approval was not required by the original FIDCR statute. Whichever the reason, there was no reference to the Department of Labor in the new statute.

The 1975 statute not only established FIDCR as the day care requirements, it did so with a degree of Congressional specificity previously left to the discretion of the Secretary:

> ...(I) subdivision III of such requirements with respect to educational services shall be recommended to the States and not required, and staffing standards for school-age children in day care centers may be revised by the Secretary, (II) the staffing standards imposed with respect to such care in the case of children under age 3 shall conform to regulations prescribed by the Secretary, and (III) the staffing standards imposed with respect to such care in the case of children aged 10 to 14 shall require at least one adult for each 20 children, and in the case of school-aged children under age 10 shall require at least one adult for each 15 children, except as provided in subparagraph (B).[9]

Whether it intended to or not, the Congress in its 1967 mandate virtually assured that compensatory standards would also apply to day care for working parents funded

under other federal statutes and sections when it mandated "a common set of program standards and regulations," with Head Start, a compensatory program.[10] The appropriateness of this approach needs re-examination in the light of Title XX's broad potential expansion of eligibility to 115 percent of the median income of a state.

Congressional Intent

It might be argued that the Congress intended in 1967 to establish program standards for day care appropriate to a compensatory goal. But there is not much evidence that the Congress intended to mandate compensatory standards. They appear to have intended to avoid warehousing programs and to insure that the kind of child-adult interaction would be comparable to the kind of care which a child would get at home if the mother were not working.[19]

There is evidence that the Congress is affected by the national confusion over standards and how federal standards relate to licensing standards. In the emotional climate which has surrounded the escalating debate, some Congressmen apparently have come to believe FIDCR are a kind of federal regulation which goes beyond funding.

Senator Bartlett of Oklahoma testified that the Congress had mandated that "on October 1, 1975, every day care center in the United States must meet rigid staff/child ratios regardless of state laws to the contrary notwithstanding."[20] He goes on to say that the "new standards are unrealistic." Because of the lack of enforcement since 1968, many operators were learning of the existence of FIDCR for the first time after they were written into law in Title XX. The controversial infant ratios were new, since the 1968 FIDCR had not covered infants at all. Believing that FIDCR are a federal regulation of all centers, Senator Bartlett accused, "HEW has assumed an improper role in the regulation of day care centers."

Congress had not intended that FIDCR act to close down private day care serving both funded and non-funded children by imposing unrealistic costs upon them. To correct this, it passed a new law in August 1976 -- HR 12455 -- providing funds for programs to meet requirements, particularly emphasizing staff-child ratios, while postponing penalties for non-compliance with FIDCR staffing until after the mandated report from the Secretary of HEW on their appropriateness.

Administrative History of FIDCR

In response to its mandate in the Economic Opportunity Act of 1967, OEO moved at once to adopt a common set of program standards and to get agreement from the different agencies involved in federal funding of child care. The Secretary of HEW had decided that the Children's Bureau would assume responsibility for Head Start when that program was to spin off from OEO to HEW.[21] It was expected that new federal support would be forthcoming for day care in a proposed comprehensive child care bill, later to be vetoed by the President. Leadership in developing common standards, and the encouragement of a local coordinating mechanism came from the Children's Bureau in preparation for the expected consolidation of day care with Head Start which never became a reality.

In the absence of written rationale for the ratios, educated guesses can be made about the reasons for the choice of 1 to 7 for fours and 1 to 5 for threes. First the children to be served in Head Start were considered to be "disadvantaged," and this ratio was for a compensatory program. Second, the emphasis in OEO and statutory language in the Economic Opportunity Act assumed that a major goal of the new day care programs would be to offer employment to low-income people, who would then be trained in the program. Trained staff would be supervising untrained staff at newly-created entry level jobs. Because of the

legal charge to develop "common program standards" with Head Start, it was inevitable that a compensatory ratio would be set -- compensatory for the assumed cultural and economic deprivation of the children, and compensatory for the lack of previous training and lack of experience of some of the staff.

HEW expected the states to enforce FIDCR without a great deal of federal monitoring. FIDCR state that "The basic responsibility for enforcement of the requirements lies with the administering agency."

"Acceptance of federal funds is an agreement to abide by the requirements. State agencies are expected to review programs and facilities at the local level for which they have responsibility and make sure that the requirements are met. Noncompliance may be grounds for suspension or termination of federal funds..."

The Requirements, clearly described as funding standards and not licensing standards, were to be enforced through some spot checking by the federal staff of the various agencies involved on the Federal Panel on Early Childhood which developed and approved them. There was, however, unclear wording on the expectations to be met by the "administering agency" and those to be met by the program. The model appears to be a federal-to-local standardized program such as Head Start, rather than the diversity of programs supported in part by purchase of service funds under Title 4-A, and now Title XX of the Social Security Amendments. FIDCR terminology does not quite fit the present model of delivery.

A major problem for enforcement appears to have been the split in responsibility within HEW. The massive increase in day care which occurred took place within state welfare agencies relating to their federal counterparts. The responsibility for standards was with the Office of Child Development which had no organized administrative relationship with the states. Leadership at the top

level was not forthcoming to assure that the two agencies would carry out their respective roles effectively. SRS had the money, and OCD had the responsibility for standards.

Another problem for OCD was the fact that the language of FIDCR is vague and difficult to interpret. Even in the fairly specific child-staff ratio, FIDCR calls for a ratio to be "normally" 1 to 7 for four year olds, to give an example. Such wording is difficult to interpret and to enforce. OCD made a number of attempts to write more specific standards, but in each of these successive drafts there were provisions which would have reduced the level of quality. During this period there was widespread fear among child advocate groups that the administration's Welfare Reform would seek to warehouse the children of the poor in low-quality and harmful programs while forcing their mothers to work at low-paying jobs. Any change in the federal standards, especially changes developed without consumer or provider input, was interpreted as a potential move against quality. The 1968 Federal Interagency Day Care Requirements came to be a symbolic standard around which to rally -- to hold the line of quality against the enemy. In June of 1972, when OCD finally produced a draft which it believed would be both enforceable and would assure quality care for children, the reaction of the advocate groups was reflex--shrill opposition. Caught between opposition of the advocate groups and the opposition of fiscal conservatives in the Office of Management and Budget who saw cost implications in the proposed new standards, the 1972 draft never saw the light of day.

FIDCR, despite its vague wording, did play an important role in the development of day care programs. It is likely that without FIDCR, it would have been much more difficult for the program development staffs in state Welfare Departments to uphold standards in the face of pressures from legislative

bodies, budget offices, and politics. FIDCR have often been used as a defense against attempts to cut quality of services to children in order to save money. In most states, except for staff-child ratios, day care quality, especially when contracted, is not substantially different from FIDCR. In general, it is the small, individual purchase of day care which has been inadequately monitored. Many such operators were not even informed about FIDCR.

FIDCR's first requirement is that programs must be licensed or approved as meeting the requirements for licensure. This policy of relying on state licensing is consistent with federal policy since 1962. It was less consistent with the federal-to-local philosophy prevalent in the late sixties in the Economic Opportunity Office and among much of the public. It is possible that the dual federal and state regulatory roles represent a compromise between older and newer philosophies at the federal level.

During the seventies, states have begun to improve their licensing practices substantially, with more attention to due process, and better enforcement, backed up by Attorney Generals' offices. Although they have failed to achieve more than 10 percent or 20 percent coverage of family day care homes, they have licensed almost all of their licensable centers except in some big cities where the lack of fit among the different regulators causes extreme problems. States are getting Head Start licensed, and are beginning to take negative action against harmful programs. As they begin to revise their requirements, an action which should take place every four or five years, they are involving the public. The realization that standards will now be enforced is forcing the child advocates on state task forces to take a hard and painful look at what standards they really want enforced. The confusion over FIDCR at the federal level is causing some serious difficulties in the process.

The Evolution of Standards for Day Care

From the historical description of how we use the word "standards," it can be seen that there has been substantial evolution from the nineteenth century to today. First, we now try to base standards on some method of objective scientific observation of children's needs, rather than on ideals derived from introspection. Second, we have moved from standards as goals to highlight investigative reports, to legal guarantees subject to legal challenge. Third, we make more careful distinctions among different kinds of standards rather than using the word indiscriminately. Fourth, we have moved from protective to preventive, family supportive standards. Particularly in day care, standards have come to represent, not protection from gross abuse, but prevention of the harmful effects of institutionalization, so that children in day care will have the best of two worlds, remaining in their families with full parental support, with a quality of out-of-home care which approximates what the parent would provide during those hours if available. Fifth, we have lost some of our innocent faith in an ever-rising standard, having come up against limited resources of both money and energy, and facing environmental hazards resulting from our rising technology. And sixth, we have moved from a nineteenth century view of our responsibility toward children as socialization through "training" or habit formation, to a new understanding of the child as a person initiating action and needing response from the human and physical environment. Respect for the child as a person with rights, combined with an understanding of the powerlessness of the child to affect social policy has led to a concern for preventive, family-supportive standards.

Some Basic Issues

The trend toward effective enforcement means that child advocates can no longer hide behind ambiguities. It is time to be clear on goals and to examine assumptions. Unless people of goodwill can share their concerns and reach a consensus of support for standards there will be no way in which standards can be imposed. The following are some of the basic questions which need to be resolved:

Who are the children in day care? Is day care for all children? poor children? problem children? There are varying opinions.

In 1969, the Child Welfare League[22] made a statement on the different purposes which day care serves. Day care may be offered as a preventive service, by which the League apparently means serving children at risk, or children for who there is reason to believe some problem may arise, or children who have some problem which needs to be prevented from getting worse. Or day care may be designed as remedial or compensatory. Here it is geared to specific treatment of an identified problem or problems. On a later page, the League identifies another possible purpose for day care, casting it into the future somewhat: "The community may eventually assume responsibility for providing day care facilities and services as a public utility available to every family, when it recognizes the universal need for day care (increasing numbers of mothers in the labor force), or when it becomes convinced that day care is good for all children, or that the family unit alone in a complex society can no longer perform the childrearing function effectively."

Yet despite the position of the League, there were many in the child welfare field already committed to the concept of day care as a public utility.

Many of the day care advocates, and especially the members of the Day Care and Child Development Council of America, had been committed to day care as a support for healthy working families since the Lanham Act days.

The same League publication points out that "Different emphasis on care, child development, education, or treatment is determined by the purpose of the program, the age of the children, their special needs, or the reasons that the service is used by parents." Day care as a "public utility" would have different standards than day care as a treatment service. The implications of these differences in goals among the child advocates is much clearer with hindsight vision than it was at the time to the advocate groups.

There is a distinction between "preventive" in its usual use in the child welfare field, and the term "family supportive" which offers societal help to healthy children in healthy families to maintain health.[23]

The purpose of day care will affect standards. If one believes that day care is needed only for families which are poor, or have health and social problems, high standards geared at the treatment of the problems will be needed. The fact that healthy families will be inhibited from using day care by the resultant high costs is of no concern, since they should not be using day care unless they have problems, according to this philosophy. Another school of thought would hold that day care should be available as a family support to parents when they need to work. Here there would be no emphasis on treatment of pathology in the standards.

Related to this question or a different way of putting it is: Is day care a compensatory program? This was clearly the philosophy of Head Start. It was not the philosophy of day care in the Lanham Act days. With the potential

expansion of eligibility under Title XX to create a single entry day care system universally accessible, it is important to think through this issue in regard to standards.

Are the standards at the federal level designed for a federal standardized "program" like Head Start, or are they policy standards which the federal government will use when purchasing or otherwise funding day care in the existing network of public and private programs at the community level? During the sixties, particularly in the anti-poverty programs, people were thinking of various "programs" to solve various social problems.

In 1970, the White House forum on day care created a sub-task force chaired by Dr. Alfred Kahn, on the delivery of services issues.[24] This group recommended a policy rather than a program approach, that we should "build on and link up the existing network of services at the community level." Standards under such an approach should avoid spelling out any particular model of administration, making policy statements without dictating structure. It is an issue which should be discussed, and consistent positions adopted, since the different assumptions inhibit communication.

A related question is this one: Does the federal government have the obligation to enforce FIDCR for all children in federally-subsidized programs or only for the federally-subsidized children?

If all children were funded, or if FIDCR were guidelines for a standardized fully-funded federal "program" this question would not even arise. However, many day care programs have tried to include the Title XX funded children along with fee-paying children in order to meet goals of community-building, integrating social classes, and meeting all the needs in a community. For such programs,

pressures of fiscal policy are intense toward abandoning their goals and either serving only federally funded children or no federally funded children. All the pressures of the system lean toward segregation of Title XX children, not because that is desirable, but because of the fact that standards, accounting procedures and all aspects of administration by the government were designed as if only the federally funded children exist. Policy is serving the needs of accountants, rather than the needs of children.

The basic question for American child care is: Who pays what share? As a nation we are committed to keeping as many services as possible in the private sector, and we have expressed that commitment through legislation granting a tax credit to working parents who pay for their own child care, and through policy of purchase of service for many human services.

A further basic problem is the effect which FIDCR will have on the costs of day care to the parent not eligible for government subsidy. When a service includes both fee-paying and government-funded children, government will not pay more than the private parents are asked to pay. There was much testimony at the Hearings on S. 2425 on the effect on costs of the federal standards, and the effect of pricing day care beyond the reach of parents who are not subsidized.[25]

Resolving these issues goes beyond the scope of determining the appropriateness of FIDCR for the present federal commitment to day care, and requires an examination of basic goals and assumptions. There is one final issue which can be considered within the limits of the present federal legislation, and that issue is the rate paid by the state. It is (3) Does the federal government have any responsibility to regulate the process by which states determine their rates of reimbursement, when the rate is not sufficient to permit the federal standard to be met?

Hearings on S. 2425 brought out the fact that Louisiana pays operators less than $3 per day. Staff-child ratios in FIDCR cannot possibly be met at that rate of reimbursement. It would seem logical to attack the reimbursement rate as the problem, rather than the standard. If there are to be federal standards, it would be reasonable to expect the federal government to have some requirements that the states have a rate-setting process in place which reflects the costs of meeting requirements. There is no way that adequate quality can be achieved if reimbursement is well below the costs of meeting required standards.

Regulation in Context: A Final Word

This paper has dealt with day care standards and the issues in their enforcement, out of the context of the larger day care issues facing this country. Yet the question of standards constantly comes up against that broader context. In particular, the major problems in enforcement of standards arise because some children are considered appropriate for public subsidy and others are not.

Title XX now offers the potential for a universally accessible day care system, where eligibility is limited only by the availability of the service, and parents pay what they can for the service.

It is time for this country to develop a commitment for an entitlement to day care assistance for parents who need such assistance for any reason, and particularly for the working parents who have been ignored in public policy until now. All studies of family life are pointing to the need for societal support to the family.

Such an entitlement should be consumer oriented and support parent choices. One system which might be seriously considered at this time is a regulated voucher system. Families would be given vouchers for child care, in the amount of a certain

percentage of the total cost of care, based on their ability to pay. Vouchers could be prioritized. A sliding fee scale could be built into the voucher system, with the card including the percentage of the overall fee which would be reimbursed. Another method would be to issue cards to all eligible people, prioritized according to the need for day care, not income; and to make such vouchers taxable income, so that a portion or all of the cost would come back to the government.

Vouchers could be used as credit cards are used, in the day care program of the parent's choice, provided that the program had been certified as meeting funding standards. The system of enforcement of that approval is a key element in such a policy, since the unregulated market will not result in a desirable quality of care.

This country's involvement in day care has always been partial, and with goals which can now be questioned. We provided day care as a jobs program during the WPA days, and during times of war as a way of meeting the national manpower needs by attracting women into the work force. Some of our earlier interest in day nurseries was to use the labor of women at low wages to build a new industrial economy. As immigrant groups were imported as labor, day care was often seen as a way to Americanize their children and eradicate cultural differences in values. Similarly, during the sixties, some of us have blamed the poor for their own poverty, and developed compensatory programs to help their children be more like us. We now provide day care for welfare recipients and the poor on the condition that they stay poor. If they work, it must be at exploitative wages.

The effect, if not the intention, of such policy is the exploitation of welfare recipients and the marginal labor pool to work at low-paying jobs, in order to avoid any real economic reform, and all under the patriotic guise of "helping the poor."

The social welfare professionals in state agencies, not facing that issue, generally avoid it by stressing the case work goals of day care, and tending to give priority to social problems rather than health as a primary goal of day care. For example, Massachusetts' Title XX plan lists "social diagnosis" as the first element in its definition of day care. Common wisdom in the conventional thought of the profession finds that the major and necessary social work roles in day care are intake and family counseling. At intake the social worker is to determine what the problem is -- not whether there is a problem. The tendency is to assume the existence of problems, and to focus on a highly diagnostic approach. Agency professionals seek to make the welfare system more humanitarian, but without changing it.

Other professionals in the day care field fear this diagnostic approach for day care, since the assumption, labelling, and treatment of pathology tends to create pathology, and since overloading the day care programs with children with serious need of treatment would undermine the normalizing benefits which a healthy, happy day care program can bring to all children. One researcher[26] found in cross-cultural comparisons of child day care that the successful programs around the world, among other characteristics, "assume the inevitability of a good outcome because they see themselves as working with essentially normal children in need of help and guidance and not sick children in need of treatment. Such a health-oriented day care program is of course an invaluable therapeutic community for children and parents with problems, but that use does not define the program. And without the program, otherwise defined, the service is not available and useful to that percentage of the population in need of therapy.

Just as it is difficult to address the issue of standards apart from the broader issues of day care, it is difficult to address the day care issue apart from the need for braoder social reforms. In a better America, day care would be offered in a social context of a policy of full employment at decent wages and a policy of family support for the parent who chooses to devote full time to child care work.

In the absence of such reforms, it is time to develop a fairer and less labor exploitative approach to day care by removing any restrictions on earnings as a condition for participation, using earnings as a basis for determining fees to be paid, but not for eligibility. If we were really interested in economic opportunity, we would be encouraging working mothers to earn as much as possible for the support of their families.

In the light of Title XX, it is time for the Congress and HEW to look at what our policy goals for day care should be, and to see its potential for a badly-needed support system for the American family, offering economic opportunity and a variety of program options with emphasis on parental choice.

The cost of such a program would probably only be met with a combination of federal, state, and local taxes, with parent fees and the encouragement of private donations. Federal legislation would be needed which offered incentives to the other sources of funds to participate, rather than total federal financing.

Planning for day care needs to be incremental, rather than master planning, since changing policies in other areas will affect it, as well as shifts in the economy. If we were to wave a magic wand and create the projected day care program tomorrow, we would find that parents would not use it at once, and that demand would build slowly as parents learn to trust the new day care. Rather than that, it is better to develop day care in small steps, within a fixed appropriation, in

the direction of the pattern of parent demand as expressed by the choices they make. A voucher system would be highly suitable to this kind of planning.

Quality child care is within the reach of this country, if we can separate it from repressive economic policies and develop a consensus for appropriate goals -- offering our support to the American family in its child-rearing responsibilities in assurance of children's rights. A key to success in achieving quality, given our national commitment to a large private sector, will be our ability to build a vigorous and respected regulatory system.

FOOTNOTES

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15. Norris E. Class, Licensing Standards Revisited, given at Tufts Summer Institute in Day Care Licensing, June 1975. Medford, Mass.

16. Cornelia Goldsmith, "The Beginnings of Things," BAEYC Reports, Vol. XVII, No. 2 December/January 1975-76, Boston, p. 84.
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(1) This section was written by Barry Mintzer. 34 F.R. 1390, January 29, 1969, 5 C.F.R. 71.1 et seq.
(2) Dec. 23, 1967, P.L. 90-222.
(3) Aug. 20, 1964, P.L. 88-452.
(4) 42 USCS 2932 (d) (1967).
(5) 42 USCS 2809 (a) (1) (1967).
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(7) 42 USCS 2932 (d) 1972.
(8) 42 USCS 1397a (9) (A) (ii) (1975)
(9) id.
(10) 42 USCS 2932 (a) (1976).

19 See "An Interview with Sen. Walter F. Mondale," Young Children. January 1976. Also see remarks by Sen. Long during Hearings Before the Committee on Finance on Sen. 2425, Oct. 8, 1975, p. 20-24, and elsewhere during the Hearings.

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